UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. MICHAEL WAYNE BELL, Defendant.	No. CR00-4104-MWB **REPORT AND RECOMMENDATION ON MOTION TO SUPPRESS**

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I. INTRODUCTION

The defendant Michael Wayne Bell ("Bell") was indicted on November 16, 2000, in a four-count Indictment charging him with manufacturing 50 grams or more of a mixture or substance containing a detectable amount of cocaine base (commonly called "crack cocaine"), in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A); possessing with intent to

distribute approximately 4.4 grams of cocaine base, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C); possessing with intent to distribute approximately 21.2 grams of cocaine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C); and seeking criminal forfeiture of $1,738.00 in currency, and other property constituting proceeds of drug trafficking activities, pursuant to 21 U.S.C. § 853. (*See* Indictment, Doc. No. 1)

On March 13, 2001, Bell filed a Motion to Suppress Evidence and supporting memorandum brief (Doc. Nos. 14 & 15), and a request for hearing (Doc. No. 16). Pursuant to the Trial Scheduling and Management Order entered February 15, 2001 (Doc. No. 11), motions to suppress in this case were assigned to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended disposition. On March 14, 2001, the court granted Bell's request for hearing, and scheduled an evidentiary hearing on the suppression motion for March 27, 2001. In its order scheduling the hearing, the court directed Bell to supplement his motion with information regarding the specific statements he seeks to suppress. As directed, Bell filed, on March 22, 2001, a supplement to his motion (Doc. No. 18).

The court also directed the Government, in its resistance to the motion, to address the specific question of Lori Gutierrez's right to consent to a search of the inside of Bell's personal possessions, such as his boots, socks, and jeans. The Government filed its resistance on March 23, 2001 (Doc. No. 19), addressing this issue in compliance with the court's order. On March 26, 2001, Bell filed a reply to the Government's resistance (Doc. No. 22).

At the hearing on March 27, 2001, Assistant U.S. Attorney Peter Deegan appeared on behalf of the Government. Bell appeared in person and with his attorney Martha McMinn. The Government presented the testimony of Lori Sue Gutierrez, law enforcement officers Randy Suggitt and Martin Divis, Assistant United States Attorney Jamie Bowers, and Assistant Woodbury County Attorney James Katcher. Bell presented the testimony of

attorney Phil Furlong, and Bell testified in his own behalf. The court admitted the following exhibits, without objection from either party: Government Exhibit 1, a form entitled "Permission for Search and Seizure," signed by Lori Gutierrez on 7-25-00; Government Exhibit 2, a handwritten statement prepared by Lori Gutierrez, dated 7-25-00; Government Exhibit 3, James Katcher's "Notes to File," dated 7/25/00 at 4:00 p.m.; and Defendant's Exhibit A, a billing statement dated December 12, 2000, from Phil Furlong to Michael Bell.

The court has reviewed the parties' briefs and carefully considered the evidence, and now considers the motion ready for decision.

II. FACTUAL BACKGROUND

Bell seeks to suppress evidence arising from a search of the home of Lori Gutierrez, including both physical evidence and Bell's statements made at the time of and subsequent to the search. The pertinent facts are as follows.

At the time of the search in question, which occurred on July 25, 2000, Bell and Gutierrez had been in a relationship for about seven months. Gutierrez had known of Bell for several years prior to entering into a relationship with him. Gutierrez works as a waitress at The First Edition, a bar in Sioux City, and she testified she had seen Bell at the bar selling drugs.[1]

Gutierrez said Bell spent the night at her apartment once or twice a week, although they did not sleep together because Bell snores. Generally, Bell would sleep on the living room sofa, while Gutierrez would sleep in the bedroom. Gutierrez's two sons, ages 15 and 17, also occupied the apartment, sharing a second bedroom. Gutierrez testified she has

[1]Gutierrez testified regarding her criminal history. Among other things, she was convicted in 1990 for going armed with intent and discharging a firearm within the city limits, and she has current theft charges pending. Gutierrez was a regular crack user in the early 1990s, and she has continued to use crack and marijuana.

done some of Bell's laundry on a couple of occasions. Bell did not keep a lot of his possessions at Gutierrez's apartment, but he usually kept a change of clothes at the apartment (shoes, underwear, shirt, pants).

A couple of weeks prior to July 25, 2000, Gutierrez confronted Bell and asked him not to bring drugs into her apartment. Bell argued that because Gutierrez smoked marijuana, it should not matter to her if he brought other drugs into the apartment. Bell came to Gutierrez's apartment on the afternoon of July 24, 2000, with a baggie of crack in his pocket. Gutierrez gave Bell a ride to the bar and then returned home. She testified she began straightening up the house, and decided to clean her closet, where Bell kept a pair of snake skin boots.[2] Gutierrez testified that as she lifted up the boots to move them, something inside one of the boots "fell down" further into the boot. Gutierrez turned the boot upside down onto the bed and found a baggie of powder cocaine and some papers with names written on them. Gutierrez was upset by the discovery because she had asked Bell not to bring drugs into her apartment, and she felt he was trying to hide the drugs from her. Bell returned to the apartment after the bar closed, around 3:00 a.m. The next morning, Gutierrez found additional drugs; a baggie of crack was in one of Bell's dirty socks that was lying on top of some shoes near the foot of the bed.

In the late morning of July 25, 2000, Gutierrez called the Tri-State Drug Task Force and arranged to meet with officers at her sister's house. Officers Suggitt and Hansen met with Gutierrez. Gutierrez told the officers about the drugs, and said she wanted Bell and the drugs out of her house. Gutierrez signed a "Permission for Search and Seizure" form (Gov't Ex. 1) that authorized officers to search her apartment for drugs, and she gave the officers a key to her apartment. She also gave the officers a handwritten statement, which says:

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[2]Gutierrez testified the boots had been in her closet since she moved into the apartment in March of that year.

> Micheal [sic] Bell came to my home [at] 3000 Park Ave. last night 7-24-00, with an ounce of powder cocaine which he put in his cowboy boot in the closet and some crack cocaine which is in his socks laying on some tennis shoes in the bedroom. He never left my home [and] he's been there ever since. I left the house at 10:30 a.m. 7-25-00. The cocaine and crack are in plastic baggies tied up.

(Gov't Ex. 2) [3]

Four officers went to Gutierrez's apartment to conduct the search: Officer Randy Suggitt, Officer Martin Divis, Officer Marie Stensrud (now Marie Divis, married to Martin Divis's brother), and Officer Troy Hansen. Gutierrez did not accompany the officers to her apartment. The officers entered the apartment using the key Gutierrez had given them, and they found Bell sleeping on a sofa in the living room. No one else was present in the apartment. Officer Divis asked Bell if he could pat him down for weapons, and Bell agreed. No weapons were found. The officers told Bell that Gutierrez had asked them to search her apartment for drugs, and told him to "hold still" on the sofa while they made sure no one else was in the apartment.

Officer Suggitt went into Gutierrez's bedroom. He testified he was specifically looking for the boots and socks described by Gutierrez. The closet door was open, and Officer Suggitt found the cowboy boots neatly placed on the floor in the closet. He squeezed the sides of the boots so he could peer down into them, and in one boot, he saw a bag of white powder that was between golfball and baseball size. He tipped the boot over and the bag of powder fell out. Officer Suggitt did not recall that anything else was in the boot besides the bag of powder. The substance in the bag later tested positive for cocaine.

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[3] This sequence of events varies from Gutierrez's testimony, in which she stated Bell came to her apartment, she took him to the bar, she found the cocaine in the boot while cleaning house, Bell returned from the bar, and then she found the crack in the sock. However, Bell has not challenged Gutierrez's statement that she found the powder cocaine in his boot, and the court finds it is not necessary to resolve this inconsistency for purposes of ruling upon Bell's motion.

Officer Suggitt also found a pair of socks that appeared to be men's white athletic socks on top of some shoes that were lined up along the wall near the foot of the bed. The officer picked up the socks and could feel a bulge in one sock. He turned the socks inside out and found a baggie of crack cocaine in one sock.

Officer Suggitt searched the remainder of the room, including the dresser drawers and the area between the mattress and springs on the bed. There was a pair of jeans that appeared to be men's blue jeans lying on the floor near the socks. The officer found several hundred dollars in one of the jeans pockets. He found additional currency lying on top of the dresser in the bedroom, in plain view. Also on top of the dresser was a piece of mail that was addressed to Bell. No other contraband was found in the apartment.

Officer Suggitt told Officer Divis what he had found in the bedroom. Officer Divis advised Bell he was going to be placed under arrest for possession of illegal drugs. He handcuffed Bell and read him his *Miranda* rights. Bell said he understood his rights. Officer Divis asked Bell if he would be willing to answer some questions, and Bell agreed. The officer asked Bell if he knew what they had found in the bedroom area. Bell said they had probably found some cocaine in a pair of boots, and there might also be some crack in the bedroom. Bell also said there was some money in the bedroom, and he admitted the money came from drug sales. Bell said the drugs and money were his and not Gutierrez's. All of Bell's statements were in response to Officer Divis's questioning and were not volunteered.

The officers asked Bell if he would be willing to go to the Task Force office in the Federal Courthouse to continue talking with them. Bell agreed, and the officers transported Bell from the apartment to the Task Force office.

At this point, the various witnesses' versions of the facts varies dramatically. The following facts are not in dispute. At some point after Bell left Gutierrez's apartment with the officers, the officers learned Bell had pending State charges and he was represented by

attorney Phil Furlong in connection with those charges. Assistant U.S. Attorney Jamie Bowers happened to be in the Task Force office on other business, and the officers asked Bowers if they should contact Furlong to discuss speaking with Bell. Bowers attempted to contact Furlong by phone, without success. At some point during the afternoon, someone – either Bowers or Officer Divis or both – did speak with Furlong. Bell also spoke with Furlong at least once. The remaining facts are in dispute. The court will set out the differing versions for purposes of this analysis.

Attorney Phil Furlong's Testimony

Furlong testified that in the summer of 2000, he represented Bell in connection with State charges. On July 25, 2000, Furlong had a full day of work scheduled, with client appointments and court appearances all day. With the parties' agreement, the court examined the following two documents and made a record as to their contents: (1) the Dakota County Motion Calendar for July 25, 2000, which indicates Furlong had court appearances scheduled at 9:30 a.m. and 1:30 p.m., and (2) Furlong's calendar for that date, which shows Furlong had another hearing at 1:00 p.m., and client appointments in his office at 10:30, 11:00 and 11:15 a.m., and 3:30, 4:00, 4:30, and 5:00 p.m.

Furlong did not recall talking with Bowers on the phone that day. He recalled talking with Bell, and testified he advised Bell not to talk to anyone without an attorney present. Furlong also recalled talking with Assistant Woodbury County Attorney Katcher. Furlong said he makes contemporaneous handwritten notes of phone conversations which he puts in the client's file. When the case is concluded and ready for billing, then he prepares his bills from those notes. Furlong read into the record his notes from the July 25th calls:

> Jamie Bowers, U.S. Attorney, 255-6011, or call 255-9128.
> Michael Bell got arrested and is at the Task Force. Urgent;
> call right away.

> Katcher called at 3:57. Bell called at 3:30. Return call on 7/25, Michael Bell. I want to be there when they talk to him. Jim Katcher.

Furlong's billing statement, Defense Exhibit A, consists of two bills dated December 12, 2000. Furlong explained the bills were for two separate State matters in which Bell had retained him, one in Associate District Court and one in District Court. The second statement contains the following entries for July 25, 2000:[4]

> Phone call from county attorney (1/4 hr). Phone call from Jamie Bowers concerning him visiting with Drug Task Force and proceeded to try to set it up (1/2 hr). Talked to Michael Bell and Task Force people. Advised him not to talk to them until we had something from County Attorney as to his protection if he did talk to them (1/2 hr).

Furlong said the notation about a call from Bowers actually referred to a phone message he received; he did not recall actually talking with Bowers.

Furlong testified he told Katcher he wanted to be present if officers talked to Bell. Furlong repeatedly stated he told Bell not to talk with officers unless his attorney was present, and he also told the Task Force officers not to talk with Bell unless he was present.

Officer Martin Divis's Testimony

Officer Divis said the officers transported Bell from Gutierrez's apartment to the Task Force office and began interviewing him. Sometime into the interview, the officers learned Bell had been arrested a few weeks earlier on charges arising from a traffic stop. They asked who represented Bell on those charges, and Bell replied it was Furlong. Officer Divis said Bell did not volunteer that he was represented by counsel and had not asked to speak to an attorney prior to that time. Officer Divis was concerned about continuing to talk

[4]The billing entries were actually prepared on December 12, 2000, from the notes prepared on July 25, 2000.

with Bell without contacting his attorney. Bowers was in the Task Force office on other matters, and Officer Divis asked Bowers if he would contact Furlong. Bowers tried to call Furlong from the officer's desk. Furlong was not available, and Bowers left a message for him. Officer Divis said he thought this call was placed at about 1:30 p.m. Bowers then left the Task Force office.

Officer Divis testified, "At that point we just sat and waited for quite a period of time." He said the officers did not continue questioning Bell at all after Bell said he was represented by Furlong until "awhile later," when Bowers called Officer Divis. Officer Divis testified Bowers told him he had finally made contact with Furlong, and Furlong had advised Bowers that it was permissible for Bell to talk to the officers if he wanted to. Officers Divis and Hansen reported this information to Bell. Bell said, "Okay, you're sure about that, that it's okay for me to talk to you if I want to?" Officer Divis said, "Yes," and Bell continued talking with the officers. Among other things, Bell told the officers about getting powder cocaine and cooking it into crack cocaine, and he disclosed to officers several drug sources in the Sioux City area.[5]

Later in the afternoon,[6] the officers asked Bell if he would be willing to make a phone call to his drug source to set up a buy. Bell said he wanted to talk to his attorney "again," to make sure he should participate in that kind of activity, as opposed to just talking with the officers. Officer Divis said Bell had not talked to his attorney from the time of his arrest up to that point. Officer Divis left the interview room to try to contact Furlong. At just that moment, Katcher called Officer Divis. The officer told Katcher about the situation, and Katcher said Furlong had just called him and "there was confusion

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[5]A recitation of the statements made by Bell after he was told Furlong had approved his conversation with the officers appears in Bell's Supplement to Motion to Suppress Evidence (Doc. No. 1. ¶ 3, pp. 2-4).

[6]Officer Divis said this was maybe between 4:00 and 5:00 p.m., but possibly a little earlier.

about whether or not he had stated it was okay for Mr. Bell to speak with [the officers]." Officer Divis told Katcher that Bowers had reported Furlong said it was permissible for the officers to speak with Bell. Katcher told Officer Divis not to talk with Bell further until Katcher had spoken with Furlong again. Katcher called back, told the officers they needed to contact Furlong, and Officer Divis called Furlong and explained the situation. Furlong wanted to speak with Bell, and the officers allowed Bell to talk with Furlong on the phone. After he hung up, Bell said he would make the phone call to try to set up a controlled buy. Officer Divis said Bell only spoke with Furlong on the phone one time, late in the afternoon (probably after 4:00 p.m.), when they had asked Bell about setting up the controlled buy.

On cross-examination, Officer Divis said the reason they took Bell to the Task Force office instead of directly to jail was that Bell said he was willing to talk with the officers. Bell did not ask to talk with his attorney first. The officers only found out Bell was represented by an attorney after they found out about his other State charges, and this occurred before the officers began questioning Bell at the Task Force office.[7]

Assistant U.S. Attorney Jamie Bowers's Testimony

Bowers testified that on July 25, 2000, he was in the Task Force office when Bell was brought in. As Bowers understood the situation, Bell had been talking with the officers when they learned Bell was represented by counsel in an unrelated State case. The officers were concerned about talking with Bell further without contacting his attorney. Officer Divis asked Bowers what to do about the situation. Bowers said he would contact the attorney to see if it was permissible for the officers to continue questioning Bell.

[7]Officer Divis's earlier testimony had indicated the officers learned about Bell's other charges and his representation by counsel after they had begun questioning him at the Task Force office, but it was not clear how far along the interview had progressed. Officer Divis said he ran into Bowers when the officer came out of the interview room in which Bell was being held.

Bowers said he tried to call Furlong without success. He went back upstairs to his office, and tried to reach Furlong again a little later. Bowers did not remember whether Furlong returned his call, or whether Furlong was available the second time Bowers called, but in any event, he was able to talk with Furlong. Bowers recalled the time as being around noon or the lunch hour; however, Bell did not arrive at the Task Force office until at least 1:30 p.m. Bowers said it was shortly after Bell got to the Task Force office that Bowers reached Furlong and spoke with him.

Bowers asked Furlong if it was permissible for the officers to continue talking with Bell. He said Furlong asked, "Well, has he been talking to the officers already?" Bowers said yes, he had been talking with the officers already and had given them information in a cooperative manner. Furlong said it was in Bell's best interests to cooperate and he would tell Bell to "do whatever he wants." Bowers said he would call the officers and tell them they could continue talking with Bell.

Bowers said he called one of the officers, he did not remember which one, and told the officer Furlong had agreed the officers could continue talking with Bell. Bowers never talked with Bell himself, and he did not talk with Katcher that afternoon.

Assistant Woodbury County Attorney James Katcher's Testimony

Katcher identified Government Exhibit 3 as his own file notes about his conversations with Furlong and Office Divis on July 25, 2000. He also testified to the sequence of events, as he recalled them. Before that date, Katcher was familiar with Bell and his pending State charges. Fairly late in the afternoon of July 25, 2000, probably after 3:00 p.m., he received a phone call from Furlong who asked why his client Michael Bell was being questioned by the Drug Task Force. Katcher said he was not aware of that and would check on it immediately.

Katcher called the Task Force and talked with Officer Divis. The officer said they had brought Bell to the Task Force office, checked with the U.S. Attorney's office about speaking with him, Bowers had contacted Furlong to find out if Furlong would approve of the officers talking with Bell, and Bowers had reported back that Furlong had approved their continuing to question Bell. Katcher told Officer Divis about his conversation with Furlong, and directed the officers not to question Bell further until Katcher had talked to Furlong again.[8]

Katcher tried to call Bowers but could not reach him. Katcher called Furlong back, and told him the Task Force officers understood Furlong had approved the officers' talking with Bell. Furlong denied he had given his approval, and claimed he had told the U.S. Attorney's office that he did not want officers talking with Bell without Furlong being present. Katcher told Furlong the officers were through talking with Bell at that point, but they wanted him to set up some drug buys. Katcher suggested he and Furlong both go over to the Task Force office to see what kind of deal they could work out for Bell with regard to the pending State cases, as well as the potential new federal case. Furlong responded he was tied up with other matters and could not go to the Task Force office at that time. Katcher told Furlong that if Bell was going to cooperate in drug buys, it would have to be done immediately, and it would be in Bell's best interests to cooperate. Katcher said it was imperative they "do it now," before Bell was taken to jail and people could find out he had been arrested. Furlong said he would meet with Bell at the jail to see if they could work out a deal. Katcher again explained to Furlong that any cooperation would have to take place before Bell was taken to the jail. At that point, Furlong indicated it was permissible for Bell to go ahead and set up the drug buys without Furlong being present. Katcher called

[8]From the evidence, it appears the Task Force officers had, by this time, already completed their questioning of Bell.

the Task Force again and told the officers Furlong had approved their working with Bell to make the drug buys without Furlong's presence.

Katcher said it was his impression, when he talked to Furlong the first time, that Furlong had not talked with Bell yet. Furlong only said he had talked with "the Feds," and had told them he did not want officers talking to Bell without Furlong present. Katcher never talked with Bowers that afternoon.

Katcher memorialized his conversations with the following notes that were placed in the County Attorney's file on Michael Bell's State charges:

> I just hung up from talking to [Bell's] attorney, Phil Furlong, and I am calling the Task Force as I am typing to tell them that Furlong told me it was OK for Bell to work with the Task Force to do some buys for the Task Force. I'm off the phone now. The Task Force (Divis) told me that they were going to take Bell to jail after I had told them about my first conversation with Furlong, in which he told me that he had told the "Feds" (Jamie Bauer [sic]) that he didn't want Bell to talk to them without Furlong present. That was a contradiction of what Divis had been told by Bauer [sic]. Bauer [sic] had apparently told Divis that Furlong said it was OK to talk to Bell without Furlong present; "that he was in too deep now, that he might as well talk". Furlong is very confusing on his position, because he also told me that he wanted to be called in when they were going to take Bell to jail so that I (Katcher) could talk to him about his deal. I didn't understand, because Bell wants to know his deal before he does any buys (duh!). So, I told Furlong we'd need to go over there now, but he said he was busy until 6:00 pm. I said again that they need to do the buys now, and Furlong said that was OK, that he doesn't need to be there for Bell to do the buys.
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> I just called Divis back, because he was going to check on what they were going to do. When I last called he thought they were taking Bell to jail, because he was being vague and his attorney was giving mixed messages about whether or not they could talk to him. When I called back just now it still wasn't certain what

> they were going to do, but it sounded like Bell was willing to do a buy. He was concerned about when he was going to get out of jail, and I told Divis to tell him he would have to post a bond. Divis said he had already told him that, but would repeat it. No promises about not being charged or what charges or disposition would be. I asked Divis if he wanted me to come over. He said not right now.

(Gov't Ex. 3)

Michael Bell's Testimony

Bell testified he was taken to the Task Force office on July 25, 2000, arriving at close to 2:00 p.m., or a little after. When he arrived at the office, the officers put him in a holding cell. He told the officers he wanted to talk to his lawyer, Furlong, and they tried to call Furlong but did not reach him. A short time later, they were able to reach Furlong on the phone, and Bell was able to talk with him, in the presence of Officers Divis and Hansen. In this conversation, Furlong told Bell not to talk to the officers. Bell testified this conversation took place before he gave any statements to the officers at the Task Force office and before the officers asked him to set up a controlled buy. Immediately after Bell talked with Furlong, the officers returned him to the holding cell in the Task Force office. According to Bell, he did not talk to Furlong again that afternoon.

At some later time, Bell was advised by the officers that Furlong had changed his mind. Officers Divis and Hansen told Bell they had talked to Furlong, and Bowers and Katcher were upstairs making a deal with Furlong. They also told Bell that Furlong had said Bell could talk to the officers. Bell testified he only talked to the officers at the Task Force office after he was told Furlong had changed his mind.

Officer Divis's Rebuttal Testimony

In rebuttal, Officer Divis testified Bell at no time asked to talk to his lawyer until the officers asked Bell to set up the controlled buy. Officer Divis said he never told Bell there was a deal being worked out with Katcher and Bowers, and never told Bell that Katcher and Bowers were upstairs.

III. FINDINGS OF FACT ON DISPUTED ISSUES

Before turning to a legal analysis of Bell's motion to suppress, the court must resolve the factual disputes outlined above. Initially, the court finds all five witnesses who testified about the events that occurred at the Task Force office on July 25, 2000 (Furlong, Officer Divis, AUSA Bowers, Assistant County Attorney Katcher, and Bell) testified truthfully to the facts as each witness recalled them to be. This makes it extremely difficult to resolve their very conflicting versions of what happened after Bell arrived at the Task Force office.

The court finds Furlong's testimony was the least probative of what took place. Furlong's recollection of the events of July 25, 2000, was poor, and based almost entirely on his sketchy contemporaneous notes and billing records prepared five months later. His notes, which the court accepts as true, suggest that he had a telephone conversation with Bell at 3:30 p.m., and a telephone conversation with Assistant County Attorney Katcher at 3:57 p.m.

The court finds most persuasive the testimony of Katcher.[9] Katcher made thorough contemporaneous notes of his conversations, and he was a completely objective, detached participant in the afternoon's activities; indeed, he likely would not have been a participant at all if Furlong had not contacted him. Katcher testified Furlong called him and stated he had told "the Feds" no one was to talk with Bell unless Bell had an attorney present. This is the response a competent defense attorney would be expected to give, and is in accord with Furlong's recollections.

Based on all of the evidence and testimony in the record, the court makes the following findings of fact. Bell arrived at the Task Force office around 2:00 p.m., or a little earlier. A short time later, Officer Divis began interviewing Bell, and almost immediately learned that Bell was represented in an unrelated state case by attorney Phil Furlong. Officer Divis stopped the questioning before Bell had made any incriminating statements at the Task Force office, left the interview room, and found AUSA Bowers. Officer Divis and Bowers discussed the situation, and Bowers told Officer Divis he would

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[9] In making these determinations of the witnesses' credibility:

> the court has considered the following factors: (1) the interest of the witness in the result of the hearing; (2) the witness's relation to any party in interest; (3) the witness's demeanor or manner while testifying; (4) the witness's tendency to speak truthfully or falsely, including the probability or improbability of the testimony given; (5) the witness's situation to see and observe; (6) the witness's apparent capacity and willingness to tell truthfully and accurately what he or she saw and observed; and (7) whether the witness's testimony is supported or contradicted by other evidence in the case. *See United States v. Phillips*, 522 F.2d 388, 391 (8th Cir. 1975); *see also United States v. Merrival*, 600 F.2d 717, 719 (8th Cir. 1979); *Clark v. United States*, 391 F.2d 57, 60 (8th Cir.), *cert. denied*, 393 U.S. 873, 89 S. Ct. 165, 21 L. Ed. 2d 143 (1968); Manual of Model Jury Instructions for the District Courts of the Eighth Circuit 3.03 (1995).

United States v. Plummer, 118 F. Supp. 2d 945, 950 n.5 (N.D. Iowa 2000) (Bennett, C.J.).

attempt to contact Furlong. Officer Divis stopped questioning Bell and waited for word from Bowers.

When Bowers called Furlong's office, Furlong was not available (he was in court), so Bowers left a message for Furlong that Bell was at the Task Force office and Bowers wanted to talk with Furlong as soon as possible. At about 3:30 p.m., Furlong returned to his office from court and found Bowers's message. Furlong first called Bell at the Task Force office and told him not to talk with anyone. Bell then advised Officer Divis he would not be making any more statements. Furlong then called Bowers, and learned Bell had made several incriminating statements to the Task Force officers at the time of his arrest at Gutierrez's apartment. He also learned the officers wanted Bell to cooperate actively by making a controlled purchase of drugs from his source. Although Furlong attempted to communicate to Bowers that Bell should not be questioned further, he apparently was not clear, and Bowers was left with the good faith impression that the Task Force officers had Furlong's permission to talk with Bell.[10] Bowers relayed this permission to the officers, who then relayed it to Bell. Bell proceeded to make several additional incriminating statements.

Shortly before 4:00 p.m., Furlong contacted Assistant County Attorney Katcher to ask why Bell was being questioned at the Task Force office. During the conversation, Furlong told Katcher he had advised Bell to stop answering questions from the officers. Katcher called Officer Divis to make sure he was not questioning Bell, and learned the officer had been told by Bowers that Furlong had approved the questioning of Bell, and the questioning had been completed. Officer Divis also told Katcher he wanted to use Bell to make a controlled purchase of drugs.

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[10] On this record, the court cannot recreate this conversation, but speculates Furlong may have unsuccessfully attempted to communicate to Bowers that Bell could proceed with active cooperation but should not be questioned further without Furlong being present.

Katcher called Furlong back and conveyed this information to him. Furlong denied he had told Bowers that Bell could be questioned in his absence. Katcher then asked Furlong if Bell could cooperate actively with the Task Force officers, and after some confusion on Furlong's part, Furlong approved Bell's active cooperation. Katcher then communicated this information to Officer Divis.

The court finds Bell made incriminating statements at the Task Force office, after first advising the officers he would be making no further statements, because he had been told by Officer Divis that Furlong had given his approval to the further questioning.

IV. ANALYSIS

A. Third-Party Consent to Search

To successfully contest the lawfulness of the search of Gutierrez's apartment, Bell "has the burden of establishing, under the totality of the circumstances, the search or seizure violated his legitimate expectation of privacy in a particular place." *United States v. Davis*, 932 F.2d 752, 756 (9th Cir. 1991) (citing *Rawlings v. Kentucky*, 448 U.S. 98, 104, 100 S. Ct. 2556, 2561, 62 L. Ed. 2d 633 (1980)*; see Minnesota v. Carter*, 525 U.S. 83, 88, 119 S. Ct. 469, 472, 142 L. Ed. 2d 373 (1998) ("We have held that 'capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.'" Quoting *Rakas v. Illinois*, 439 U.S. 128, 143, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978); and citing *Rawlings, supra*, 448 U.S. at 106). There is no dispute that Bell was an overnight guest in Gutierrez's apartment. It is well settled that an overnight guest has a legitimate expectation of privacy in his host's home, and therefore is authorized to contest a search of the host's home. *See, e.g., Minnesota v. Olson*, 495 U.S. 91, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990); *United States v. Oates*, 173 F.3d 651, 656 (8th Cir.) (citing *Olson*), *cert.*

denied, 528 U.S. 890, 120 S. Ct. 213, 145 L. Ed. 2d 179 (1999). The court finds Bell is authorized to contest the search.

The Task Force officers who searched Gutierrez's apartment did so without a warrant, but with Gutierrez's consent.

> It is well established that warrantless searches violate the Fourth Amendment unless they fall within a specific exception to the warrant requirement, *United States v. Karo*, 468 U.S. 705, 717, 104 S. Ct. 3296, 3304, 82 L. Ed. 2d 530 (1984), and that consent is "one of the specifically established exceptions to the requirements of both a warrant and probable cause." *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043-44, 36 L. Ed. 2d 854 (1973). . . .

United States v. Jaras, 86 F.3d 383, 388 (5th Cir. 1996). The government has the burden of establishing an exception to the Fourth Amendment's warrant requirement by a preponderance of the evidence. *See U.S. v. Basinski*, 226 F.3d 829, 833 (7th Cir. 2000); *Jaras*, *supra*, 86 F.3d at 389.

Bell does not contest, nor could he reasonably contest, Gutierrez's right to consent to a search of her own apartment. Bell argues, however, that Gutierrez had no right to consent to a search of the inside of his private belongings, such as his boots, dirty socks, and jeans pockets. He argues the officers' search of his personal belongings violated the Fourth Amendment's protection against unreasonable searches and seizures. There is no question the Fourth Amendment protection "extends to both 'houses' and 'effects.'" *United States v. Jeffers*, 342 U.S. 48, 51, 72 S. Ct. 93, 95, 96 L. Ed. 59 (1951). Thus, the court must determine whether the officers violated Bell's rights by relying on Gutierrez's consent in searching Bell's belongings.

In *United States v. Ross*, 456 U.S. 798, 805-06, 102 S. Ct. 2157, 2163, 72 L. Ed. 2d 572 (1982),[11] the Supreme Court discussed warrantless searches at length:

> A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search. Thus, a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found. A warrant to open a footlocker to search for marihuana would also authorize the opening of packages found inside. A warrant to search a vehicle would support a search of every part of the vehicle that might contain the object of the search. When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand.
>
> This rule applies equally to all containers, as indeed we believe it must. . . . [A] constitutional distinction between "worthy" and "unworthy" containers would be improper. Even though such a distinction perhaps could evolve in a series of cases in which paper bags, locked trunks, lunch buckets, and orange crates were placed on one side of the line or other, the central purpose of the Fourth Amendment forecloses such a distinction. For just as the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion, so also may a traveler who carries a toothbrush and a few articles of clothing in a paper bag or

[11] In *Ross*, the Supreme Court revisited the scope of the "automobile exception" to the Fourth Amendment established in *United States v. Carroll*, 267 U.S. 132, 151, 45 S. Ct. 280, 284, 69 L. Ed. 2d 543 (1925). The *Carroll* exception permits the warrantless search of a vehicle that is stopped based on probable cause. In *Ross*, the Court extended the exception to include everything within such a vehicle, including closed containers.

> knotted scarf claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attache case.

Ross, 456 U.S. at 820-22, 102 S. Ct. at 2170-71 (footnotes omitted). The Court quoted with approval from Professor LaFave's treatise on searches and seizures, as follows:

> In describing the permissible scope of a search of a home pursuant to a warrant, Professor LaFave notes:
>
> > "Places within the described premises are not excluded merely because some additional act of entry or opening may be required. 'In countless cases in which warrants described only the land and the buildings, a search of desks, cabinets, closets and similar items has been permitted.'" 2 W. LaFave, Search and Seizure 152, (1978) (quoting *Massey v. Commonwealth*, 305 S.W.2d 755, 756 (Ky. 1957)).

Ross, 456 U.S. at 821 n.27, 102 S. Ct. at 2171 n.27.

The question here is whether the consent of an apartment lessee to search her apartment, including a bedroom another person sometimes shares with her, authorizes the search of boots, dirty socks, and jeans lying about in the bedroom. In answering this question, the analysis begins with the "obvious" standard recognized by the Supreme Court in *United States v. Karo*, 468 U.S. 705, 715, 104 S. Ct. 3296, 3303, 82 L. Ed. 2d 530 (1984):

> At the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable. Our cases have not deviated from this basic Fourth Amendment principle. Searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances. *Welsh v. Wisconsin*, 466 U.S. 740, 748-749, 104 S. Ct. 2091, 2097, 80 L. Ed. 2d 732 (1984); *Steagald v. United States*, 451 U.S. 204, 211-212, 101 S. Ct.

> 1642, 1647-1648, 68 L. Ed. 2d 38 (1981); *Payton v. New York*, 445 U.S. 573, 586, 100 S. Ct. 1371, 1380, 63 L. Ed. 2d 639 (1980).

A significant difference exists, however, between a warrantless search, even one based on probable cause, and a search that is conducted with the consent of one who has "common authority over or other sufficient relationship to the premises or effects sought to be inspected." *United States v. Matlock*, 415 U.S. 164, 171, 94 S. Ct. 998, 993, 39 L. Ed. 2d 242 (1974). "'[W]here two persons have equal rights to the use or occupation of premises, either may give consent to a search, and the evidence thus disclosed can be used against either.'" *Id.*, 415 U.S. at 169 n.4, 94 S. Ct. at 992 n.4 (quoting, with approval, *United States v. Sferas*, 210 F.2d 69, 74 (7th Cir.), *cert. denied sub nom. Skally v. United States*, 347 U.S. 935, 74 S. Ct. 630, 98 L. Ed. 1086 (1954)).

For Gutierrez's consent to a search of Bell's boots, socks, and jeans to be valid, the Government must demonstrate that Gutierrez had actual or apparent authority to consent to such a search. *Basinski*, 226 F.3d at 834; *Jaras*, *supra*, 86 F.3d at 389 (citing *Illinois v. Rodriguez*, 497 U.S. 177, 186-87, 110 S. Ct. 1793, 2800-01, 111 L. Ed. 2d 148 (1990); *Matlock*, *supra*, 415 U.S. at 169-70, 94 S. Ct. at 992). If the Government fails to sustain this burden, the evidence must be suppressed. *Basinski*, 226 F.3d at 834.

To establish actual authority, the Government must show the following:

> A finding of actual authority requires proof that the consenting party and the party challenging the search "mutually used the property searched and had joint access to and control of it for most purposes, so that it is reasonable to recognize that either user had the right to permit inspection of the property and that the complaining co-user had assumed the risk that the consenting co-user might permit the search." *United States v. Rizk*, 842 F.2d 111, 112-13 (5th Cir.) (*per curiam*), *cert. denied*, 488 U.S. 832, 109 S. Ct. 90, 102 L. Ed. 2d 66 (1988).

Jaras, 86 F. 3d at 389; *see United States v. Fultz*, 146 F.3d 1102, 1105 (9th Cir. 1998) (citing *United States v. Welch*, 4 F.3d 761, 764 (9th Cir. 1993)). The "common authority" required for a third party to validly authorize a search "is, of course, not to be implied from the mere property interest a third party has in the property." *Matlock*, 415 U.S. at 171 n.7, 94 S. Ct. at 171 n.7. As the Supreme Court explained:

> The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, *see Chapman v. United States*, 365 U.S. 610, 81 S. Ct. 776, 5 L. Ed. 2d 828 (1961) (landlord could not validly consent to the search of a house he had rented to another), *Stoner v. California*, 376 U.S. 483, 84 S. Ct. 889, 11 L. Ed. 2d 856 (1964) (night hotel clerk could not validly consent to search of customer's room)[,] but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

Id.

The present case presents the "more difficult case" described by Justice O'Connor in her concurring opinion in *Karo*:

> A more difficult case arises when one person's privacy interests fall within another's, as when a guest in a private home has a private container to which the homeowner has no right of access. The homeowner who permits entry into his home of such a container effectively surrenders a segment of the privacy of his home to the privacy of the owner of the container. Insofar as it may be possible to search the container without searching the home, the homeowner suffers no invasion of his privacy when such a search occurs; the homeowner also lacks the power to give effective consent to the search of the closed container.

468 U.S. at 726, 104 S. Ct. at 3309 (O'Connor, J., concurring).

Although Gutierrez's actual authority to consent to a search of her entire apartment, including the bedroom, is without question, her authority to consent to a search of Bell's clothing is a close call.[12] The court finds she had authority to consent to the search of Bell's clothing. Her authority arose from Bell leaving the clothing lying casually about the bedroom, and his historical acquiescence in Gutierrez's handling of his clothing.

Bell was aware that Gutierrez would do his laundry on occasion, and there is no evidence in the record he ever objected to the practice. He stored his boots and a few clothing items in her home on a continuous basis, and left them strewn about her bedroom, where he should have expected she would pick them up, move them about, or put them away. Although he had a reasonable expectation of privacy in the home, his expectation was limited by common sense; that is, "'[f]rom the overnight guests's perspective, he seeks shelter in another's home precisely because it provides him with . . . a place where [the guest] . . .and his possessions will not be disturbed by anyone *but his host and those his host allows inside.*'" *United States v. Oates*, 173 F.3d 651, 655 (8th Cir. 1999) (quoting *Minnesota v. Olson*, 495 U.S. 91, 99, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990) (emphasis by the *Oates* court).

Alternatively, the court finds Gutierrez had apparent authority to consent to the search of Bell's clothing. To establish apparent authority, the Government must show "a reasonable person, with the same knowledge of the situation as that possessed by the

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[12] *See, e.g., Hoffa v. United States*, 385 U.S. 293, 301, 87 S. Ct. 408, 413, 17 L. Ed. 2d 374 (1966):

> What the Fourth Amendment protects is the security a man relies upon when he places himself or his property within a constitutionally protected area, be it his home or his office, his hotel room or his automobile. There he is protected from unwarranted government intrusion. And when he puts something in his filing cabinet, in his desk drawer, or in his pocket, he has the right to know it will be secure from an unreasonable search or an unreasonable seizure. (Footnote omitted.)

government agent to whom consent was given, would reasonably believe that the third party had authority over the area to be searched." *Basinski*, 226 F.3d at 834 (citing *Illinois v. Rodriguez*, 497 U.S. 177, 188, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990); *United States v. Chaidez*, 919 F.2d 1193, 1201 (7th Cir.1990)); *see also Welch, supra.*

A somewhat instructive case in the present analysis is *Frazier v. Cupp*, 394 U.S. 731, 89 S. Ct. 1420, 22 L. Ed. 2d 683 (1969). Evidence used to convict Frazier was found in a duffel bag that was owned by Frazier, but was being used, with Frazier's consent, by his cousin Rawls. The bag was in Rawls's home. While police were arresting Rawls, they asked if they could have his clothing. Rawls directed the officers to the duffel bag, which they searched with the consent of both Rawls and his mother. Inside the bag, the police found Rawls's clothing, and also some of Frazier's clothing, which they also seized. Frazier argued "Rawls only had actual permission to use one compartment of the bag and that he had no authority to consent to a search of the other compartments." 394 U.S. at 740, 89 S. Ct. at 1425. The Court held:

> We will not, however, engage in such metaphysical subtleties in judging the efficacy of Rawls' consent. Petitioner, in allowing Rawls to use the bag and in leaving it in his house, must be taken to have assumed the risk that Rawls would allow someone else to look inside. We find no valid search and seizure claim in this case.

Id. The Court found that because Rawls "was a joint user of the bag, he clearly had authority to consent to its search. The officers therefore found evidence against [Frazier] while in the course of an otherwise lawful search. Under this Court's past decisions, they were clearly permitted to seize it." *Id.* (citations omitted). *Accord United States v. Fultz*, 146 F.3d 1102, 1105 (9th Cir. 1998) ("A third party has actual authority to consent to a search of a container if the owner of the container has expressly authorized the third party to give consent or if the third party has mutual use of the container and joint access to or control over the container. A third party has apparent authority to consent to a search if the

officers who conduct the search reasonably believe that the third party has actual authority to consent." (Citations omitted.))

Based on the facts in the record, the court finds "'the facts available . . . justified a reasonable officer in the belief that the consenting party [Gutierrez] had authority over the premises,'" and could consent to a search of the entire premises by authorities. *Oates*, 173 F.3d at 657 (quoting *United States v. Czeck*, 105 F.3d 1235, 1239 (8th Cir. 1997)). *See United States v. Broadus*, 7 F.3d 460, 464 (6th Cir. 1993) (consent to search a postal locker authorized search of an outer jacket pocket placed in the locker by a third person). A reasonable officer could conclude Gutierrez had authority to consent to a search of all clothing items found in her apartment, including Bell's boots, socks, and jeans.

In conclusion, the court finds the search did not violate Bell's Fourth Amendment rights, and the physical evidence seized in the search of Gutierrez's apartment should not be suppressed. The court also finds Bell's statements at the apartment acknowledging ownership of the drugs and money[13] were made after he was advised of his *Miranda* rights, and were made incident to his lawful arrest. Therefore, the court recommends Bell's motion to suppress be **denied** as to that evidence.

The court next turns to an analysis of the admissibility of Bell's statements after he arrived at the Task Force office.

B. Bell's Statements at the Task Force Office

The Supreme Court long has recognized that custodial interrogations are inherently coercive. *See Dickerson v. United States*, ___ U.S. ___, ___, 120 S. Ct. 2326, 2331 (2000); *New York v. Quarles*, 467 U.S. 649, 654, 104 S. Ct. 2626, 2630, 81 L. Ed. 2d 550 (1984) (both citing *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)).

[13]These statements are identified in paragraphs 1 and 2 of Bell's Supplement to Motion to Suppress Evidence (Doc. No. 18, pp. 1-2).

In *Miranda v. Arizona*, the Supreme Court observed that custodial interrogations, by their very nature, generate "compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." 384 U.S. 436, 467, 86 S. Ct. 1602, 1624, 16 L. Ed. 2d 694 (1966).

"To combat this inherent compulsion, and thereby protect the Fifth Amendment privilege against self-incrimination, *Miranda* imposed on the police an obligation to follow certain procedures in their dealings with the accused." *Moran v. Burbine*, 475 U.S. 412, 420, 106 S. Ct. 1135, 1140, 89 L. Ed. 2d 410 (1986). These procedures include fully apprising a suspect of the prosecution's intention to use his statements to secure a conviction and informing him of his rights to remain silent and to have counsel present if he so desires. *Miranda*, 384 U.S. at 468-70, 86 S. Ct. at 1624-26. If the suspect indicates in any manner prior to or during questioning that he wishes to remain silent or wants an attorney, any interrogation must cease. *Id.* at 473-74, 86 S. Ct. at 1627.

Statements elicited from a suspect by police questioning after the suspect has communicated to the police his wish to remain silent generally are inadmissible. As the Eighth Circuit Court of Appeals stated in *United States v. Cody*, 114 F.3d 772 (8th Cir. 1997):

> Once a person in custody has invoked her right to remain silent, admissibility of any of her subsequent statements depends on whether her "'right to cut off questioning' was 'scrupulously honored.'" [*Michigan v.*] *Mosley*[,] 423 U.S. [96,] 104, 96 S. Ct. [321,] 326[, 46 L. Ed. 2d 313] (quoting *Miranda*, 384 U.S. at 474, 479, 86 S. Ct. at 1628, 1630).

Id., 114 F.3d at 775.

In *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), the Supreme Court held that a suspect who has "expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication,

exchanges, or conversations with the police." *Id*, 451 U.S. at 484-485, 101 S. Ct. 1880 at 1884-1885.[14] *See also Winnick v. Mississippi*, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990) (*Edwards* rule applies to prohibit police from reinitiating interrogation even after the accused has consulted with an attorney); *Arizona v. Roberson*, 486 U.S. 675, 682-85, 108 S. Ct. 2093, 2098-2100, 100 L. Ed. 2d 704 (1988) (*Edwards* rule applies where police-initiated interrogation follows a request for counsel in a separate investigation); *but see Moran v. Burbine*, *supra* (where police fail to inform suspect of attorney's prearraignment efforts to reach him, neither *Miranda* nor the Fifth Amendment requires suppression of confession after voluntary waiver of *Miranda* rights). For purposes of the present discussion, it is important to note that *Edwards* focuses on the state of mind of the suspect and not of the police. *See Arizona v. Roberson*, *supra*, 486 U.S. at 687, 108 S. Ct. at 2101 (citing *Edwards)*.

A suspect may waive the rights contained in the *Miranda* warnings "provided the waiver is made voluntarily, knowingly and intelligently." *Miranda*, 384 U.S. at 444, 86 S. Ct. at 1628. However, "[a] waiver of *Miranda* rights is invalid if, in the totality of the circumstances, the accused's will was overborne." *United States v. Holloway*, 128 F.3d 1254 (8th Cir. 1997) (citing *United States v. Makes Room*, 49 F.3d 410, 414 (8th Cir. 1995)); *see United States v. Caldwell*, 954 F.2d 496, 505 (8th Cir. 1992) (waiver of *Miranda* rights is determined under totality of the circumstances and in light of the entire course of police conduct) (citing *Oregon v. Elstad*, 470 U.S. 298, 318, 105 S. Ct. 1285, 1297, 84 L.

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[14]In order to determine whether the "rigid prophylactic rule" of *Edwards* applies in a given situation, courts must determine whether the accused has actually invoked his right to counsel. *Davis v. United States*, 512 U.S. 452-53, 458 114 S. Ct. 2350, 2355, 129 L. Ed. 2d 362 (1994) (suspect must unambiguously request counsel) (citing *Smith v. Illinois*, 469 U.S. 91, 95, 105 S. Ct. 490, 492, 83 L. Ed. 2d 488 (1984) (*per curiam*), *quoting Fare v. Michael C.*, 442 U.S. 707, 719, 99 S. Ct. 2560, 2569, 61 L. Ed. 2d 197 (1979)); *see also McNeil v. Wisconsin*, 501 U.S. 171, 178, 111 S. Ct. 2204, 2209, 115 L. Ed. 2d 158 (1991).

Ed. 2d 222 (1985)). *See also United States v. Kime*, 99 F.3d 870, 880 (8th Cir. 1996); *United States v. Anderson*, 929 F. 2d 96, 99 (2d Cir. 1991).[15]

Furthermore, "[t]here is a strong presumption against waiver," and the Government has the burden to show a suspect "'knowingly and intelligently waived his privileges against self-incrimination and his right to retained or appointed counsel.'" *Soffar v. Johnson*, 237 F.3d 411, 454 (5th Cir. 2000) (quoting *Miranda*, 384 U.S. at 475, 86 S. Ct. at 1628). "Indeed, courts must "'indulge every reasonable presumption against waiver of fundamental constitutional rights.'" *Id.* (citations omitted).

In *United States v. Boyd*, 180 F.3d 967 (8th Cir. 1999), the Eighth Circuit Court of Appeals explained how to determine whether a waiver of *Miranda* rights is valid:

> "The determination of whether an accused has knowingly and voluntarily waived his *Miranda* rights depends on all the facts of each particular case." *Stumes v. Solem*, 752 F.2d 317, 320 (8th Cir. 1985). The circumstances include "the background, experience, and conduct of the accused." *Id.* The government

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15 A confession is not voluntary when obtained under circumstances that overbear the defendant's will at the time it is given. *See Lynumn v. Illinois*, 372 U.S. 528, 534, 83 S. Ct. 917, 920, 9 L. Ed. 2d 922 (1963). Whether a confession is a product of coercion may only be determined after a careful evaluation of the totality of all the surrounding circumstances, including the accused's characteristics, the conditions of interrogation, and the conduct of law enforcement officials. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S. Ct. 2041, 2047, 36 L. Ed. 2d 854 (1973); *Green v. Scully*, 850 F.2d 894, 901-02 (2d Cir.), *cert. denied*, 488 U.S. 945, 109 S. Ct. 374, 102 L. Ed. 2d 363 (1988); *see also Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461 (1938) (to determine whether defendant made "an intentional relinquishment or abandonment of a known right or privilege" courts must examine "the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused"). The prosecution has the burden of establishing by a preponderance of the evidence that a suspect waived his *Miranda* rights, and that his confession is truly the product of free choice. *See Colorado v. Connelly*, 479 U.S. 157, 168- 69, 107 S. Ct. 515, 522-23, 93 L. Ed. 2d 473 (1986).

> has the burden of proving that the defendant "voluntarily and knowingly" waived his rights. *Id*.

Id., 180 F.3d at 977; *see also United States v. Barahona*, 990 F.2d 412, 418 (8th Cir. 1993) (government bears burden of proving by preponderance of evidence that defendant knowingly, voluntarily, and intelligently waived his rights). When a suspect asks for an attorney, and then reinitiates conversation, the burden "remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation." *Oregon v. Bradshaw*, 462 U.S. 1039, 1044, 103 S. Ct. 2830, 2834, 77 L. Ed. 2d 405 (1983).

An inquiry into whether a suspect's *Miranda* rights have been waived "has two distinct dimensions." *Moran*, 475 U.S. at 421, 106 S. Ct. at 1141 (citing *Edwards v. Arizona*, *supra*, 451 U.S. at 482, 101 S. Ct. at 1883; *Brewer v. Williams*, 430 U.S. 387, 404, 97 S. Ct. 1232, 1242, 51 L. Ed. 2d 424 (1977)). As the Court explained:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. *Fare v. Michael C.*, 442 U.S. 707, 725, 99 S. Ct. 2560, 2572, 61 L. Ed. 2d 197 (1979). *See also North Carolina v. Butler*, 441 U.S. 369, 374-375, 99 S. Ct. 1755, 1758, 60 L. Ed. 2d 286 (1979).

Moran, 475 U.S. at 421, 106 S. Ct. at 1141; *see United States v. Jones*, 23 F.3d 1307 (8th Cir. 1994); *Caldwell*, 954 F.2d at 504. As the Court also held in *Moran*:

> Only if the "totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the

> requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Moran, 475 U.S. at 421, 106 S. Ct. at 1141 (quoting *Fare v. Michael C.*, 442 U.S. 707, 725, 99 S. Ct. 2560, 2571, 61 L. Ed. 2d 197 (1979)).

These principles recently were summarized by the Eighth Circuit Court of Appeals in *Holman v. Kemna*, 212 F.3d 413 (8th Cir. 2000), as follows:

> Inquiry into the validity of a waiver has two distinct dimensions -- whether the waiver is voluntary and whether it is knowing and intelligent. *See United States v. Turner*, 157 F.3d 552, 555 (8th Cir. 1998). A waiver is voluntary if it is the product of a free and deliberate choice rather than intimidation, coercion, or deception. *See id*. A waiver is knowing and intelligent if it has been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. *See id*. The burden of proving that a defendant has knowingly and voluntarily waived his right to have counsel present at an interrogation rests with the government. *See United States v. Eagle Elk*, 711 F.2d 80, 82 (8th Cir. 1983).

Id., 212 F.3d at 420.

With respect to allegations of police coercion in eliciting statements from a suspect, in *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 1689, 64 L. Ed. 2d 297 (1980), the Supreme Court held "coercion is determined from the perspective of the suspect." *See Illinois v. Perkins*, 496 U.S. 292, 296, 110 S. Ct. 2394, 2397, 110 L. Ed. 2d 243 (1990); *see also United States v. Huerth*, 239 F. 3d 865, 871 (7th Cir 2001) (coercion should be analyzed "from the perspective of a reasonable person in the position of the suspect*"); cf. Roberson, supra,* 486 U.S. at 687, 108 S. Ct. at 2101. Factors that should be considered in evaluating police coercion are the conduct of the law enforcement officials and the capacity of the suspect to resist the pressure to confess. *United States v. Johnson*, 47 F.3d 272, 276 (8th Cir. 1995). Other relevant factors are "the defendant's age, education, intelligence level, and mental state; the length of the defendant's detention; the

nature of the interrogations; the inclusion of advice about constitutional rights; and the use of physical punishment, including deprivation of food or sleep." *Huerth*, 239 F. 3d at 871.

In *United States v. Turner*, 157 F.3d 552 (8th Cir. 1998), the Eighth Circuit noted that finding a *Miranda* waiver to be invalid requires more than coercive police activity:

> It is true, as the government notes, that in [*Colorado v.*] *Connelly*, 479 U.S. [157,] 167, 107 S. Ct. 515, [522, 93 L. Ed. 2d 473 (1986)], the Supreme Court held "that coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary.'" However, later that term, in *Colorado v. Spring*, 479 U.S. 564, 107 S. Ct. 851, 93 L. Ed. 2d 954 (1987), the Supreme Court made clear that validity of a *Miranda* waiver has "'two distinct dimensions'" -- whether the waiver is voluntary and whether it is knowing and intelligent. *Id*. at 573, 107 S. Ct. 851 (quoting *Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986)).

Turner, 157 F.3d at 555. Relying on *Connelly*, the court in *Turner* held police coercion is a necessary prerequisite to a determination that a waiver was involuntary, but not to the separate question of whether the waiver was knowing and intelligent. *Id.* The requisite "coercion" may take the form of the accused being "'threatened, tricked, or cajoled into a waiver [which] will, of course, show that the defendant did not voluntarily waive his privilege [against self-incrimination.'" *Soffar*, *supra*, 237 F.3d at 454 (quoting *Miranda*, 384 U.S. at 476, 86 S. Ct. at 1629).

The court must apply these principles to the facts of the present case to determine whether Bell knowingly, intelligently, and voluntarily waived his *Miranda* rights.[16]

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[16] The attorney-client issues in this case are controlled by an analysis of the Fifth Amendment as interpreted by *Miranda* and its progeny, rather than by an analysis of the Sixth Amendment right to counsel. Under the latter, the right to counsel:

> is offense specific. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced, that is, "'at or after the initiation of adversary judicial criminal proceedings -- whether

(continued…)

Throughout this analysis, the court will keep in mind the "twin rationales [for suppressing evidence] – trustworthiness and deterrence," to see whether suppression of the statements would serve the general goal of deterring unlawful police conduct and the Fifth Amendment goal of assuring the receipt of trustworthy evidence. *See Anderson*, 929 F. 2d at 102 (citing *Elstad*, 470 U.S. at 308, 105 S. Ct. at 1292).

At Gutierrez's apartment, Bell was given the appropriate *Miranda* warnings, and then he made several incriminating statements. As the court previously has ruled, those

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[16](…continued)

> by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *United States v. Gouveia*, 467 U.S. 180, 188, 104 S. Ct. 2292, 2297, 81 L. Ed. 2d 146 (1984) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689, 92 S. Ct. 1877, 1882, 32 L. Ed. 2d 411 (1972) (plurality opinion)). And just as the right is offense specific, so also its *Michigan v. Jackson* effect of invalidating subsequent waivers in police-initiated interviews is offense specific.

McNeil v. Wisconsin, 501 U.S. 171, 175, 111 S. Ct. 2204, 2207, 81 L. Ed. 2d 146 (1984).

The Supreme Court expanded upon the *McNeil* holding in the recent case of *Texas v. Cobb*, ___ U.S. ___, 2001 WL 309572 (April 2, 2001). Cobb was represented by counsel on a burglary charge. In the course of the burglary, a woman and her infant daughter had disappeared. Officers questioned Cobb about the disappearances outside the presence of his attorney. After he was given the *Miranda* warnings, Cobb confessed to murdering the woman and her daughter. Based on the principle that the Sixth Amendment right to counsel is "offense specific," the Supreme Court held Cobb's uncounseled confession was not obtained in violation of the Sixth Amendment. The Court observed:

> [I]t is critical to recognize that the Constitution does not negate society's interest in the ability of police to talk to witnesses and suspects, even those who have been charged with other offenses.
>
> > Since the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, society would be the loser. Admissions of guilt resulting from valid *Miranda* waivers "are more than merely 'desirable'; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *McNeil*, 501 U.S., at 181, 111 S. Ct. 2204 (quoting *Moran v. Burbine*, 475 U.S. 412, 426, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986)).

Texas v. Cobb, 2001 WL 309572 at *6.

statements are admissible. Later, at the Task Force office, before making any further incriminating statements, Bell exercised his right to remain silent, and so advised Officer Divis.[17] Then, after Bell was advised by Officer Divis that his attorney had approved his answering further questions, Bell again gave up his right to remain silent, and made several additional incriminating statements.

The question to be decided in the present case is whether, under the peculiar facts of this case, the Government has sustained its burden of proving that Bell gave up his right to remain silent "voluntarily, knowingly, and intelligently." *Miranda*, 384 U.S. at 444, 86 S. Ct. at 1628. This determination must be made from the perspective of a reasonable person in Bell's position, and not from the perspective of the police. *See Rhode Island v. Innis*, *supra*, 446 U.S. at 301, 100 S. Ct. at 1689; *Huerth*, 239 F.3d at 871; *see also Moran*, 475 U.S. at 423, 106 S. Ct. at 1142 (state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his rights);[18] *Arizona v. Roberson*, *supra*, 486 U.S. at 687, 108 S. Ct. at 2101 (citing *Edwards*). The two dimensions of waiver are (1) whether the waiver was voluntary, and (2) whether the waiver was knowing and intelligent. *Holman*, 212 F.3d at 420.

A waiver is "voluntary" if it is the product of "a free and deliberate choice rather than intimidation, coercion, or deception." *Id*. There is no question that Bell's choice was

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[17]This was after the prosecutor had contacted the attorney representing Bell on State charges, and the attorney had advised Bell to answer no further questions. Before the attorney was contacted, Bell had been given his *Miranda* rights, and had agreed to talk with the officers. Bell did not ask to talk with an attorney. Under these circumstances, the prosecutor had no obligation to contact the attorney before the officers continued with their questioning. *See Moran v. Burbine*, 475 U.S. at 424, 106 S. Ct. at 1142 (*Miranda* does not prevent police from deliberately misleading attorney to prevent contact with client who had waived his *Miranda* rights). However, after the prosecutor contacted Bell's attorney, the attorney became, for Fifth Amendment purposes, Bell's attorney on the present charges.

[18]In *Moran*, the Supreme Court held, "whether intentional or inadvertent, the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his rights." *Id*. 475 U.S. at 423, 106 S. Ct. at 1142.

free and deliberate, in the sense that no one forced him to give up his right to remain silent and he was not rushed or pressured into doing so. Also, there are no facts in the record to support a claim he was intimidated or coerced into giving up his right to remain silent. Therefore, Bell's waiver of his *Miranda* rights was voluntary unless it was the product of deception.

In some situations, it is permissible for the police to mislead a suspect without invalidating a confession. *See, e.g., Illinois v. Perkins,* 496 U.S. at 297, 110 S. Ct. at 2397 ("Ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda*'s concerns"); *Oregon v. Mathiason,* 429 U.S. 492, 495-496, 97 S. Ct. 711, 714, 50 L. Ed. 2d 714 (1977) *(per curiam*) (officer's falsely telling suspect that suspect's fingerprints had been found at crime scene did not render interview "custodial" under *Miranda*); *Frazier v. Cupp*, 394 U.S. 731, 89 S. Ct. 1420, 22 L. Ed. 2d 684 (1969) (lie that cousin had confessed did not invalidate defendant's confession); *Hoffa v. United States,* 385 U.S. 293, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966) (placing an undercover agent near a suspect in order to gather incriminating information was permissible under the Fifth Amendment); *United States v. Valasquez,* 885 F. 2d 1076, 1087 (3d Cir. 1989) (lie that defendant's companion had implicated defendant and was being released did not invalidate confession). However, no case has ever held that it is permissible for the police to deceive or mislead a suspect about his *Miranda* rights.[19]

[19]In fact, police deception about a suspect's *Miranda* rights can invalidate a confession even thought the deception occurred *after* the suspect was properly advised of his rights and waived them. In *United States v. Anderson*, 929 F. 2d 96 (2d Cir. 1991), a government agent gave the *Miranda* warnings to the defendant, and the defendant agreed to give a statement. Then the agent went further, and told the defendant that "if he asked for a lawyer it would permanently preclude him from cooperating with the police." *Id.*, 929 F.2d at 98. The court suppressed the ensuing confession, holding that under the totality of the circumstances, the agent's false statement about the consequences of asking for a lawyer "contributed to the already coercive atmosphere inherent in custodial interrogation and rendered [the defendant's] confession involuntary as a matter of law." *Id.*, at 102.

After Bell had exercised his right to remain silent at the Task Force office, he decided to resume talking with the Task Force officers because he had been told, incorrectly, that his attorney had approved the further questioning. Although this information was incorrect, it was communicated to Bell because of confusion arising from the conversation between his attorney and Bowers, and not because the Task Force officers or the prosecution were trying to deceive him. On these facts, there was no culpability on the part of the police or the prosecution. In the absence of culpability of the police or the prosecution, the defendant's waiver of his *Miranda* rights cannot be said to be the product of intentional deception.

Under the *Turner* test, because Bell's waiver of his right to remain silent was not the product of "intimidation, coercion, or deception," his statements at the Task Force office were voluntary. *See Turner*, 157 F.3d at 555.

A waiver is "knowing and intelligent" if "it is made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Holman*, 212 F.3d at 420. Bell was properly advised of his *Miranda* rights, and from this record, was fully aware of the nature of the rights he was abandoning (*i.e.*, the right to remain silent, and the right to representation by counsel), and the consequences of his decision (*i.e.*, his statements would be used against him in court). Thus, his waiver was knowing and intelligent.

Although the forgoing principles are somewhat difficult to apply to the peculiar facts of the present case, after considering the facts in light of the "twin rationales" for suppressing evidence, trustworthiness and deterrence (*Elstad*, 470 U.S. at 308, 105 S. Ct. at 1292), it is clear that suppression of Bell's statements would not serve either rationale. Suppression would not deter unlawful police conduct, because there was none. Suppression would not advance the Fifth Amendment goal of assuring the receipt of trustworthy evidence, because there is no question concerning the trustworthiness of the Bell's

statements. The court finds Bell waived his *Miranda* rights, and his waiver was voluntary, knowing and intelligent.

V. CONCLUSION

The court has concluded Gutierrez had the right to consent to a search of her apartment, including Bell's clothing inside the apartment. The court also has concluded Bell voluntarily, knowingly, and intelligently waived his *Miranda* rights in talking with officers at the Task Force office.

Accordingly, **IT IS RECOMMENDED**, unless any party files objections[20] to the Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this report and recommendation, that Bell's motion to suppress evidence be **denied**.

IT IS SO ORDERED.

DATED this 4th day of April, 2001.

_____
PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

[20]Objections must specify the parts of the report and recommendation to which objections are made. Objections also must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).